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Federal Communications Commission

DA 98-1426

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-134
Table of Allotments,) RM-9271
FM Broadcast Stations.)
(Sheridan, Wyoming and Colstrip, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 15, 1998;

Released: July 24, 1998

Comment Date: September 14, 1998

Reply Comment Date: September 29, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Community Media, Inc. ("petitioner"), licensee of Station KYTI(FM), Channel 243C3, Sheridan, Wyoming, proposing the substitution of Channel 229C for Channel 243C3 at Sheridan, and the modification of Station KYTI(FM)'s construction permit (File No. BPH-980211IE) accordingly.¹ To accommodate the upgrade, petitioner also proposes the substitution of Channel 258A for Channel 229A at Colstrip, Montana, and the amendment of Brian M. Encke's ("Encke") pending application for a construction permit (File No. BPH-970731MK) to specify operation on Channel 258A in lieu of Channel 229A, with cut-off protection. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that it is requesting the allotment of Channel 229C at Sheridan because of its proximity to co-owned Station KZWY(FM)'s frequency in Sheridan, Wyoming.² Petitioner further states that upgrading Station KYTI(FM) to Channel 229C would allow for duplexed operation of Stations KYTI(FM) and KZWY(FM). Duplexed operation

¹Petitioner seeks the amendment of its recently granted construction permit to modify Station KYTI(FM)'s transmitter site.

²Station KZWY(FM), Channel 235C1, is licensed to Lovcom, Inc. ("Lovcom"). Lovcom and Community Media, Inc. ("CMI") are co-owned by common principals. Lovcom currently has a pending application (File No. BPH-980217IF) seeking the modification of the Station KZWY(FM)'s facilities to specify, inter alia, a new transmitter site.

necessitates that Stations KYTI(FM) and KZWY(FM) frequencies be reasonably close. Petitioner asserts that diplexed operation of the stations will serve the public interest by allowing Lovcom and CMI to operate both stations using only one antenna, resulting in one less discrete source of radiofrequency radiation. Further, diplexed operation will alleviate some of the public's concerns related to environmental and aesthetic issues associated with multiple radio transmission facilities. Moreover, diplexed operation of Stations KYTI(FM) and KZWY(FM) will allow Lovcom and CMI to benefit from co-location of the stations, and will enable them to redirect savings resulting from the diplexed operation to better serve the public through additional community service programming.

3. We believe the proposal warrants consideration since the allotment of Channel 229C at Sheridan, Wyoming, would enable Station KYTI(FM) to expand its service area. An engineering analysis has determined that Channel 229C can be allotted to Sheridan in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's authorized construction permit site.³ Additionally, Channel 258A can be allotted at Colstrip at Encke's requested application site.⁴

4. As requested, we shall propose to modify the license of Station KYTI(FM) at Sheridan to specify operation on Channel 229C in lieu of 243C3. In accordance with Section 1.420(g)(2) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 229C at Sheridan, Wyoming, since petitioner has demonstrated the availability of an additional equivalent channel at Sheridan for use by such other interested parties. If the proposal is adopted, the applicant for Channel 229A at Colstrip, Montana, will be permitted to amend his application to specify operation on Channel 258A, with cut-off protection.

5. Whenever an existing licensee or permittee is ordered to change frequency to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. See Circleville and Columbus, Ohio, 8 FCC 2d 159 (1967). Here, the requirement is not applicable because the applicant for Channel 229A at Colstrip, Montana, is not yet a permittee. However, in the event a construction permit is issued for Channel 229A at Colstrip, Montana, prior to the finalization of this proceeding, petitioner will be required to reimburse the permittee for reasonable costs incurred in changing frequency. Therefore, petitioner should indicate its willingness to abide by that requirement. Failure to do so could result in a denial of this proposal.

³The coordinates for Channel 229C at Sheridan are North Latitude 44-37-20 and West Longitude 107-06-57.

⁴The coordinates for Channel 258A at Colstrip are North Latitude 45-53-42 and West Longitude 106-36-38.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Sheridan, Wyoming	235C1, 243C3	235C1, ⁵ 229C
Colstrip, Montana	229A	258A

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making to the following applicant:

Brian M. Encke
1503 Copperville Road
Cheyenne, Wyoming 82001

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before September 14, 1998, and reply comments on or before September 29, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory

⁵A "one-step" upgrade application was filed by petitioner requesting the substitution of Channel 235C for Channel 235C1 at Sheridan, Wyoming

Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making and Order to Show Cause to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be

accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.